TETANGGA AKRAB SDN BHD

v.

TUAN JAWIE & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: 22-132-2000-III/II]
13 APRIL 2002

CIVIL PROCEDURE: *Trial - Right to begin - Defendants claiming native customary rights against plaintiff's action for trespass and nuisance over land - Whether defendants had the initial burden of proving their claim - Rules of the High Court 1980, O. 35 r. 4(2) - Sarawak Land Code 1958, s. 5(7) - Evidence Act 1950, ss. 103, 106*

NATIVE LAW AND CUSTOM: *Land dispute - Native and customary rights - Whether state land presumed free of such rights until contrary is proved - Sarawak Land Code 1958, s. 5(7) - Evidence Act 1950, ss. 103, 106*

The plaintiff filed a claim in tort against the defendants for trespass and nuisance on two parcels of land ('the lands'). The defendants disputed the claim, alleging that they had native customary rights over the lands. The preliminary issue was whether the defendants had the initial burden of proving their claim on their native customary rights under s. 5(7) of the Sarawak Land Code 1958 ('Code').

Held:

[1] Ordinarily, it is the plaintiff who should begin his case as clearly stated in O. 35 r. 4(2) Rules of the High Court 1980 ('RHC'). However, for the claim of native customary rights, O. 35 r. 4(2) RHC must be read together with s. 5(7) of the Code. Section 5(7) of the Code is compatible with s. 103 of the Evidence Act 1950 ('EA'). Both the said sections when read together made it abundantly clear that the burden was on the defendants to prove that their native customary rights overrode those of the plaintiff in respect of the disputed lands. (pp 173 h-i & 174 a-d)

[2] The defendants should also start first based on s. 106 of the EA. That section provides that any fact especially within the knowledge of a person should be proved by him. Here, there was no documentary evidence to prove that the disputed lands were encumbered with native customary rights. The facts alleged by the defendants that the disputed lands were subject to those rights were especially within their knowledge. Further, the plaintiff had produced two provisional leases over the subject matter

and that was *prima facie* evidence of the right of possession of the disputed lands. Hence, the burden of proof was on the defendants to show that the plaintiff's provisional leases were encumbered with their native customary rights. (pp 175 d-h & 176 a-b)

[3] The fact that the plaintiff had started first by calling the first witness did not cause any prejudice or injustice to the defendants. (p 176 d)

[Defendants to start first.]

Case(s) referred to:
Annamalai Chettiar v. Yeoh Kee Tin (m.w) [1957] MLJ 9 ***(refd)***
Mohamed Myddin v. Teo Mek Yok [1966] 2 MLJ 284 ***(refd)***
PP v. Lim Kwai Thean [1959] MLJ 179 ***(refd)***
Yee Hoi Kong v. Ban San [1966] 2 MLJ 271 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 103, 106
Rules of the High Court 1980, O. 35 r. 4(2)
Sarawak Land Code 1958, s. 5(7)

For the plaintiff - William Chang (Ratanah Devi & Evonne Ho); M/s Yong & Co
For the defendants - Dominique Ng; M/s Dominique Ng & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Zakaria Sam JC:

On 24 January 2002, upon the oral application of the learned counsel for the plaintiff, I allowed the said oral application and ordered that the defendant should start first ie, to prove the existence of the native customary rights over the two provisional leases held by the plaintiff. Being dissatisfied with the said decision, the defendants appealed.

In this case, the plaintiff based its claim on tort that the defendants have committed trespass and nuisance on the plaintiff's lands, whereas, the defendants in essence put up a defence that they have native customary rights over the disputed lands.

The trial of this action has commenced with the conclusion of the evidence given by the plaintiff's first witness at the stage of the examination-in-chief. In the midst of cross-examination by the learned counsel for the defendants, the learned counsel for the plaintiff made an oral application urging the court to compel the defendants at this stage to adduce evidence on the existence of their native customary rights. The learned counsel for the plaintiff submitted that the defendants have the initial burden to prove their claims on native customary rights, based on s. 5(7) of the Sarawak Land Code 1958.

The learned counsel for the defendants on the other hand submitted, firstly, that the trial has already begun with the plaintiff's first and main witness being cross-examined. Therefore, the plaintiff has accepted and conceded that it would give its evidence first. Secondly, under O. 35 r. 4(2) of the Rules of the High Court 1980 (after this RHC), it provides that the plaintiff shall begin by opening his case. Thirdly, it is not the whole burden of proof which lies upon the defendants. In this connection it is for the plaintiff to prove:

(a) That the two provisional leases are within the two Forest Reserves namely, Balai Ringin Forest Reserve and Balai Karangan Forest Reserve; and

(b) Where the lands are not covered by the two provisional leases, the permission from the district officers concerned had been obtained; and

(c) Where the lands are covered by the two forest reserves, such forest reserves have completely and totally extinguished the defendants' native customary rights; and

(d) That the two provisional leases are not encumbered by any defendants' right; and

(e) That the defendants have committed trespass and nuisance on the plaintiff's lands.

Fourthly, the plaintiff has yet to establish a *prima facie* case that indeed it is the owner of the two provisional leases. Evidence of PW1 is not conclusive as the provisional leases clearly have encumbrances and yet to be surveyed.

The Issue

This case involved two main issues. The first issue concerned the rights of the respective parties herein over the lands and the second issue is for damages.

To my mind, the first issue is the primary issue that needs to be resolved before proceeding to the question of damages.

It is abundantly clear here that the two parties in this action are claiming that they have certain legitimate rights over the lands in dispute which lead to the issue as to whom should start first.

Findings

Ordinarily, it is the plaintiff who should begin his case as clearly stated in O. 35 r. 4(2) RHC as follows:

> Subject to para. (6) the plaintiff shall begin by opening his case.

For the native customary rights claim, this O. 35 r. 4(2) RHC must be read together with s. 5(7) of the Sarawak Land Code 1958 (the Land Code) which reads:

> Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any State land, it shall be presumed until the contrary is proved, that such state land is free of and not encumbered by any such rights.

The provisions of s. 5(7) of the Code is compatible with s. 103 of the Evidence Act which provides:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

By reading s. 5(7) of the Land Code together with s. 103 of the Evidence Act, it is abundantly clear the burden is on the defendants to prove that their native customary rights override those of the plaintiff in respect of the said two parcels of land.

In *Yee Hoi Kong v. Ban San* [1966] 2 MLJ 271, the appellant being the owner of the premises brought an action to recover possession of the premises let to the respondent. The respondent did not deny the tenancy but alleged that the premises were controlled premises within the meaning of the Control of Rent Ordinance 1956. The learned president held that the onus of proof that the premises were not controlled premises was on the appellant and as he did not prove that the house was built after 1 January 1948, the claim for vacant possession must be dismissed. On appeal it was held that as it was the respondent who asserted that the premises were controlled premises, therefore the burden of proof was on him and not on the appellant.

In *Mohamed bin Myddin v. Teo Mek Yok* [1966] 2 MLJ 284, the plaintiff claimed possession of a shop-house let to the defendant. The shop-house was originally erected prior to 1948 but there was either a renovation or a re-erection of the premises in 1953. The plaintiff claimed that the premises were rebuilt in 1953 and was not protected by the Control of Rent Ordinance. The defendant claimed that the premises were merely renovated in 1953 and that the premises were erected prior to 1948 and that they were protected by the Ordinance. The learned president held that the burden of proof that the premises were not controlled premises was on the plaintiff. After hearing the parties, he came to the conclusion that the premises were rebuilt in 1953 and that premises were not protected. The defendant appealed to the High Court and then to the Federal Court. The Federal Court held that the learned president was wrong in holding that the burden of proving that the premises

were not controlled premises was on the plaintiff. It was the defendant who alleged that premises were protected and the burden of proof was on him, and the learned president should have called upon him to begin. In the said judgment the Federal Court quoted with approval the decision of Buhagiar J in *Annamalai Chettiar v. Yeoh Kee Tin (m.w.)* [1957] MLJ 9, where His Lordship stated:

> There is nothing in that section (section 12) affecting the general principles of evidence regarding the burden of proof as laid down particularly in section 103 of the Evidence Ordinance, 1950; under that section the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact is to lie on any particular person.

Section 106 of the Evidence Act is the other factor that convinced me to arrive at the finding that the defendants should start first. The said section provides:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Here there is no documentary evidence to prove the said provisional leases are encumbered with native customary rights. The facts alleged by the defendants that the leases are subject to native customary rights are especially within their knowledge, therefore they must prove it.

This s. 106 is an exception to s. 101 of the Evidence Act which lays down the general principle that in a civil case the burden of proof lies on the plaintiff. However s. 106 is not intended to relieve the plaintiff of its duty. It is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the plaintiff to establish facts which are especially within the knowledge of the defendants.

The word 'especially' had been defined by Good J in *PP v. Lim Kwai Thean* [1959] MLJ 179 where his Lordship said:

> To interpret that section properly, I think it is essential to concentrate upon what was meant by the word "especially". It does not say "'exclusively', or 'solely', within the knowledge of any person." And, as I see it, the effect of the word 'especially' is this: That if it is an easy matter for the person concerned to prove a fact the proof of which by the prosecution would present the prosecution with biordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution; and that is, as I understand it, the *ratio decidendi* of the case in *Abdul Manap v. PP* [1952] MLJ at p. 181.

In the instant case, PW1 had produced two provisional leases over the subject mater and that is *prima facie* evidence of the right of possession of the two parcels of lands. On the other hand, if the defendants are claiming that their native customary rights supersede the rights of the plaintiff, a matter as much within their own knowledge as the possession of a railway ticket, it would fall squarely within the circumstances described in illustration (b) to s. 106 of the Evidence Act. Hence, it is incumbent for the defendants to show that the said lands are encumbered with native customary rights as those facts are pre-eminently or exceptionally within their knowledge.

Practicality and convenience is the spirit behind s. 106 of the Evidence Act. This section in the clearest language provides that the burden of proving the said lands subject to native customary rights is on the defendants.

It is manifestly clear from the pleadings, the laws and the authorities cited above that the burden of proof is on the defendants to show that the plaintiff's two provisional leases were encumbered by their native customary rights.

As for the issue that the plaintiff has started its case by calling the first witness, I am of the view that it would not in any way cause any prejudice or injustice to the defendants. PW1 in his evidence had produced two provisional leases that the plaintiff acquired from the state authority in April 2000. Therefore, the burden now shifts to the defendants to prove that the lands are encumbered with native customary rights.

Conclusion

Premised on the above, I conclude that the defendants' objection to the plaintiff's application is without merit.

I hereby order the defendants to start first to prove their claim on native customary rights over the two provisional leases held by the plaintiff.

No order as to costs.